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**BROWARD v. ENVIRONMENTAL PROTECTION AGENCY:
CERCLA's BAR ON PRE-ENFORCEMENT REVIEW OF EPA
CLEANUPS UNDER SECTION 113(h)**

I. INTRODUCTION

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in December of 1980 as a means to cope with the most heavily polluted hazardous waste sites in the country.¹ The ultimate goal of the statute is to protect the natural environment and save human lives by facilitating the cleanup of environmental contamination and imposing costs on the responsible parties.² Intending to ensure prompt cleanup of contaminated sites, Congress amended CERCLA in 1986 to include a timing provision, 42 U.S.C. section 9613(h) (CERCLA section 113(h)), that bars federal district courts from reviewing certain Environmental Protection Agency (EPA) actions before they are completed.³

Since the addition of section 113(h), courts have reached different conclusions regarding the extent of the provision's bar on immediate review of challenges to CERCLA cleanups.⁴ While a majority of courts agree that all claims should be barred, a minority of courts maintain that review should be available to claims when a

1. See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1994) [hereinafter CERCLA] (providing comprehensive federal program for cleanup of abandoned hazardous waste sites throughout United States). For a further discussion of CERCLA, see *infra* notes 40-62 and accompanying text. See also Jonathan N. Reiter, Comment, *CERCLA Section 113(h) & RCRA Citizen Suits: To Bar or Not to Bar?* 17 UCLA J. ENVTL. L. & POL'Y 207, 208 (1999). CERCLA attacks environmental problems on two fronts, first holding potentially reliable parties strictly liable for conduct involving hazardous substances; and second, establishing a trust fund, known as the Superfund, that the Environmental Protection Agency [hereinafter EPA] utilizes to finance remedial and removal efforts. See *id.*

2. See Reiter, *supra* note 1 at 208 (noting CERCLA and similar state laws were created to identify sites, clean them up, and hold those responsible for contamination financially accountable).

3. See Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 113(h), 100 Stat. 1613 [hereinafter SARA] (furthering goals of CERCLA by preventing delays of removal and remedial actions).

4. See Michael P. Healy, *The Effectiveness and Fairness of Superfund's Judicial Review Preclusion Provision*, 15 VA. ENVTL. L.J. 271, 307 (1996) (arguing CERCLA should be amended to provide pre-enforcement review of claims when interests harmed outweigh interest in foreclosing CERCLA review prior to implementation or enforcement).

delayed review would be inadequate or contrary to the ultimate objectives of CERCLA.⁵

This Note, through an analysis of the District Court of Southern Florida's decision in *Broward Garden Tenant's Ass'n v. EPA* (*Broward*),⁶ discusses whether CERCLA unconditionally bars citizens from challenging remedies selected by EPA under the statute. Section II summarizes the facts of *Broward*.⁷ Section III examines the history of section 113(h) and the relevant law surrounding its application.⁸ Section IV explains the District Court of Southern Florida's holding and rationale.⁹ Section V provides a critical analysis of the court's determination that section 113(h) bars federal jurisdiction over pre-enforcement review of all challenges to EPA remedial actions.¹⁰ Section V also discusses whether the *Broward* holding was consistent with recent court decisions, congressional intent, and good environmental policy.¹¹ Finally, Section VI discusses the impact and future effects of the *Broward* decision.¹²

II. FACTS

The City of Fort Lauderdale purchased land that was to become the Wingate Superfund Site (Wingate Site) in 1951.¹³ Three years later, the city began operating the Wingate Site as an incinerator and landfill and continued to do so until it closed the site in

5. See *id.* (noting minority of courts have expressly or impliedly concluded review of non-liability based CERCLA claims should be available prior to implementation of cleanups).

6. 157 F. Supp. 2d 1329 (S.D. Fla. 2001) [hereinafter *Broward*].

7. For a discussion of *Broward* facts, see *infra* notes 13-39 and accompanying text.

8. For a discussion of CERCLA and the statutory and judicial background of 42 U.S.C. § 9613(h) (CERCLA § 113(h)), see *infra* notes 40-113 and accompanying text.

9. For a narrative analysis of the *Broward* decision, see *infra* notes 114-136 and accompanying text.

10. For a critical analysis of the *Broward* decision, see *infra* notes 137-168 and accompanying text.

11. For a discussion of how the *Broward* decision fits in with other recent court decisions, congressional intent and good environmental policy, see *infra* notes 137-168 and accompanying text.

12. For a discussion of the impact of the *Broward* decision upon federal jurisprudence, see *infra* notes 169-174 and accompanying text.

13. See *Broward*, 157 F. Supp. 2d 1329, 1333 (S.D. Fla. 2001). The Wingate Road Municipal Incinerator Dump covered sixty-one acres in Fort Lauderdale, Broward County, Florida. See *EPA: NPL Site Narrative at Listing*, at <http://www.epa.gov/superfund/sites/npl/nar428.htm> (last updated Oct. 4, 1989). The site included an incinerator, offices, and an approximately forty-acre disposal area, all owned and operated by the City of Fort Lauderdale. See *id.* Property in the surrounding area was used for a combination of residential, commercial, and industrial purposes. See *id.*

June of 1978.¹⁴ Broward Gardens, a public housing complex constructed by Fort Lauderdale in the 1970s, is located within a quarter-mile of the Wingate Site.¹⁵ The population of Broward Gardens is approximately ninety-nine percent African-American.¹⁶

EPA placed the Wingate Site on its National Priorities List (NPL) in 1989 after conducting initial environmental studies of the site.¹⁷ The following year the State Health Department of Florida conducted a preliminary health study and found cancer levels were higher in the areas surrounding the Wingate Site than in any other part of Broward County.¹⁸ After conducting additional studies of the site and soliciting public comments, EPA developed a proposed remedial plan to cleanup the site.¹⁹

In 1995, after reviewing the proposed remedial plan, the Florida Department of Environmental Protection (FDEP) sent a letter to EPA addressing a list of ten concerns with EPA's cleanup plan.²⁰ Among the concerns was EPA's use of a level to quantify the cancer risk factor that was less stringent than the level accepted by the state.²¹ Despite FDEP's continued protests, EPA used the original risk factor in its final proposal.²²

14. See *Broward*, 157 F. Supp. 2d at 1333. The city began operating a second incinerator at the Wingate Site with a cooling-water pond in 1966. See *id.* Ash contained in the cooling-water spread into the ground in the disposal area contributing to the pollution of the site. See EPA: Florida NPL Site Summaries, *Wingate Road Municipal Incinerator Dump Study*, at <http://www.epa.gov/region4/waste/npl/nplfls/wingatfl.htm> (last updated Sept. 15, 2000) [hereinafter EPA: Florida NPL Summaries] (providing history of Wingate Site).

15. See *Broward*, 157 F. Supp. 2d at 1333. Broward Gardens was planned and subsidized by the United States Department of Housing and Urban Development [hereinafter HUD] pursuant to the United States Housing Act of 1937. See *id.*

16. See *id.* Plaintiffs cited the racial composition of Broward Gardens to support their claim that the final consent decree perpetuated racial segregation. See *id.* at 1335.

17. See *id.* at 1333-34. The National Priorities List [hereinafter NPL] is a list of highly prioritized hazardous waste sites. See CERCLA, 42 U.S.C. § 9605 (1994).

18. See *Broward*, 157 F. Supp. 2d at 1334. It was determined that the Wingate Site exposed nearby residents to hazardous contaminants, such as dioxin and arsenic, when it released them into the atmosphere and soil. See *id.* The area's drinking water and fish were also affected by these contaminants. See also EPA: Florida NPL Site Summaries, *supra* note 14.

19. See *Broward*, 157 F. Supp. 2d at 1334. CERCLA gives EPA the authority to provide for remedial action relating to hazardous substances whenever a hazardous substance is released or when there is a substantial threat of such a release. See CERCLA, 42 U.S.C. § 9604 (1994).

20. See *Broward*, 157 F. Supp. 2d at 1334 (referring to one of several non-parties voicing concern over EPA's proposed remedial plan).

21. See *id.* EPA was using a factor of 1×10^{-4} , while the Florida Department of Environmental Protection [FDEP] required a level of 1×10^{-6} . See *id.*

22. See *id.* (noting risk factor used in EPA's proposal was same used in final consent decree).

On September 11, 1998, pursuant to section 122 of CERCLA, EPA filed a consent decree in the District Court of Southern Florida.²³ EPA also solicited public comments on the proposals contained in the decree pursuant to CERCLA section 117(a)(1).²⁴ In October 1998, several parties, including the Legal Aid Services of Broward County, Inc. (LAS) and the Legal Environmental Assistance Foundation (LEAS), submitted comments challenging the adequacy of the proposed remedy for the Wingate Site.²⁵ Among the comments were concerns that the proposed remedial action did not require soil cleanup to the degree required by Florida law and

23. See *id.* at 1335 (citing *United States v. Fort Lauderdale*, 81 F. Supp. 2d 1348 (S.D. Fla. 1999)). A summary of EPA's remedial actions contained in the consent decree is as follows:

1. excavation of contaminated soil and incinerator ash in the southern twenty acres of the site, which exceed the EPA's risk threshold, and disposal of adjacent landfill;
2. drainage, treatment, and disposal of water in the abutting lake and excavation of the lake's contaminated sediments;
3. construction of a geosynthetic cap with erosion controls over the landfill;
4. institutional controls to maintain the site cap, control storm water, and provide for the installation of fencing and signs;
5. institutional controls and/or groundwater use restrictions within the site boundary;
6. storm water management;
7. natural attenuation of contamination for the surface water at abutting lake;
8. ground water, surface water, sediment, and fish tissue monitoring.

Id. at 1334-35; see generally *EPA: Florida NPL Site Summaries*, *supra* note 14 (detailing cleanup process).

24. See *Broward*, 157 F. Supp. 2d at 1335; 42 U.S.C. § 9617(a) (CERCLA § 113(h)) provides:

(a) Proposed plan

Before adoption of any plan for remedial action to be undertaken . . . [an appointed person] . . . shall take both of the following actions:

- (1) Publish a notice and brief analysis of the proposed plan and make such plan available to the public.
- (2) Provide a reasonable opportunity for submission of written and oral comments and an opportunity for a public meeting at or near the facility at issue regarding the proposed plan and regarding any proposed findings . . . relating to cleanup standard[s].

The notice and analysis published under paragraph (1) shall include sufficient information as may be necessary to provide a reasonable explanation of the proposed plan and alternative proposals considered.

(b) Final plan

Notice of the final remedial action plan adopted shall be published and . . . made available to the public before commencement of any remedial action. Such final plan shall be accompanied by a discussion of any significant changes (and the reasons for such changes) . . .

42 U.S.C. § 9617(a) (1995).

25. See *Broward*, 157 F. Supp. 2d at 1334-35 (referring to two of large number of parties that submitted comments challenging proposed remedy pursuant to § 117).

that the remedial action did not assure protection of human health with respect to carcinogenic concentrations of arsenic and dioxin.²⁶

Following the mandatory public comment period, the United States moved to enter the consent decree between EPA and Fort Lauderdale.²⁷ The consent decree contained the final plan of the remedial action, which in all relevant parts, was the same as the proposed plan.²⁸ Several non-parties residing in close proximity to the Wingate Site challenged the adequacy of the selected remedy and opposed the United States' motion to enter the consent decree.²⁹ In *United States v. Fort Lauderdale (Fort Lauderdale)*,³⁰ the District Court of Southern Florida held that according to CERCLA, the non-parties did not have standing, and the court's scope of review was limited to a determination of whether the consent decree complied with the law.³¹ As a result, the court entered the consent decree.³² Shortly thereafter, EPA and Fort Lauderdale implemented the remedial action as outlined in the consent decree.³³

After the cleanup began, the Broward Garden Tenants Association (Plaintiffs) brought an action against EPA and Fort Lauderdale (Defendants) for declaratory and injunctive relief from the consent decree.³⁴ Plaintiffs claimed that the remedial cleanup plan con-

26. See *id.* Legal Aid Services of Broward County, Inc. [hereinafter LAS] and Legal Environmental Assistance Foundation [hereinafter LEAS] also believed that the plan omitted certain contaminated areas of the Wingate Site and as a result of the plan's inadequacies the site would never be removed from the NPL. See *id.*

27. See *id.* (recognizing EPA made no significant changes to proposed remedial plan).

28. See *id.* at 1334. According to CERCLA § 117(a), EPA is not required to amend a remedial plan in response to significant public comments and criticisms. See 42 U.S.C. § 9617(a). For the wording of 42 U.S.C. § 9617(a) (CERCLA § 117(a)), see *supra* note 24.

29. See *Fort Lauderdale*, 81 F. Supp. 2d 1348, 1349 (S.D. Fla. 1999). The non-parties included Bass-Dillard Neighborhood Issues and Prevention, Inc., and individuals Curtis Brown, Carolyn Young, and Hamilton Forman. See *id.*

30. 81 F. Supp. 2d 1348 (S.D. Fla. 1999).

31. *Id.* at 1349 (noting consent decree was reasonable and was adequate to protect public health and environment).

32. See *id.* at 1353 (stating court would not substitute its judgment for EPA's regarding reasonableness of decree or adequacy to protect public health and environment).

33. See *Broward*, 157 F. Supp. 2d at 1334-35 (referring to \$20 million remedial plan currently being implemented).

34. See *id.* at 1336. In March of 1999 Judge William P. Dimitrouleas of the Southern District of Florida entered the consent decree in *Fort Lauderdale*, 81 F. Supp. 2d at 1348. The parties to this lawsuit agreed upon a consent decree, and included an agreement as to payments totaling approximately \$20 million from the various defendants to pay for the remedial action. See *id.* Defendants also include officers of EPA, Administrator Christine Whitman and Acting Regional Administrator, Region IV A. Stanley Meiburg, and HUD. See *Broward*, 157 F. Supp. 2d at 1332. The tenants association is an organization composed of residents liv-

tained in the consent decree was not an adequate remedy for the high level of toxins and pollutants at the Wingate Site, and that by following the inadequate cleanup plan EPA and the city were, in effect, perpetuating racial segregation.³⁵ Plaintiffs' objections to the remedial plan included those previously made by FDEP, LAS, and LEAS as well as objections to the "cap and leave" remedy, whereby a plastic cap is used to cover a contaminated area.³⁶

Defendants in *Broward* moved to dismiss Plaintiffs' suit for lack of subject matter jurisdiction pursuant to section 113(h) of CERCLA.³⁷ The District Court of Southern Florida granted the motion, finding that Plaintiffs' desired remedy, the prevention of an EPA remedial action, conflicted with the intent of section 113(h).³⁸ The court determined that the relief sought by Plaintiffs would directly interfere with and delay the cleanup plan, the very problem section 113(h) was intended to prevent.³⁹

ing in the Broward Gardens Complex in Fort Lauderdale, Florida. *Id.* Plaintiffs also include individual adult residents of Broward Gardens. *See id.*

35. *See Broward*, 157 F. Supp. 2d at 1332. The Plaintiffs filed a seven-count complaint for declaratory and injunctive relief alleging: Count I, violation of the Fifth Amendment (against EPA); count II, violation of the Thirteenth Amendment and 42 U.S.C. § 1982 (against Fort Lauderdale); count III, violation of the Fourteenth Amendment and 42 U.S.C. § 1983 (against Fort Lauderdale); count IV, violation of Title VI of the Civil Rights Act of 1964 (against Fort Lauderdale); count V, violation of Title VIII of the Civil Rights Act of 1964 (against EPA, Fort Lauderdale, and former EPA Administrator Browner, and former Regional Director of Region IV, Hankinson); count VI, violation of the Fair Housing Act, 42 U.S.C. §§ 1304 et seq. (against HUD); and count VII, violation of the Fifth Amendment (against Browner and Hankinson). *See id.*

36. *See id.* at 1335. EPA often "caps" a landfill with an impermeable layer, and installs drains and gas collection systems to contain contamination. *See EPA: Superfund Cleanup Tools*, at <http://www.epa.gov/oerrpage/superfund/accomp/400/tools.htm> (last updated Feb. 1, 2001). Plaintiffs claim that the plastic cap will be ineffective and should be withdrawn, as was done for the Stauffer Chemical Superfund Site in Tarpon Springs, Florida, an area that has a 93.3% white population. *See Broward*, 157 F. Supp. 2d at 1335.

37. *See Broward*, 157 F. Supp. 2d at 1337. As grounds for their motion to dismiss, the federal Defendants contended that: (1) the court lacked subject matter jurisdiction over the case pursuant to § 113(h) of CERCLA, (2) the Plaintiffs lacked Article III standing to bring their claims, (3) Defendants were immune from suit, and (4) the claims against HUD were barred by the applicable statute of limitations. *See id.* at 1332-33. "Like the federal [D]efendants, [Fort Lauderdale] argue[d] that the complaint had to be dismissed under § [113(h)] of CERCLA." *Id.* at 1333. Fort Lauderdale also claimed that: (1) Plaintiffs failed to properly effect service of process upon the city and, therefore, the court lacked personal jurisdiction over the City, (2) the complaint failed to state a claim upon which relief could have been granted, and (3) the Tenants Association did not have standing to bring the claims alleged in the complaint. *See id.*

38. *See id.* at 1335-37 (finding challenge would delay cleanup).

39. *See id.* at 1329 (holding it lacked jurisdiction to review challenge to EPA remedial cleanup plan prior to its completion).

III. BACKGROUND

In December 1980, Congress enacted CERCLA to enable EPA to quickly and effectively respond to environmental problems resulting from the release of hazardous waste.⁴⁰ The purpose of CERCLA is to provide an effective mechanism for cleaning up environmental hazards as quickly as possible and to ensure that parties responsible for the problems bear as much of the cleanup expense as possible.⁴¹ To meet this end, CERCLA provides federal funds to ensure the cleanup of hazardous substances and federal authority to recover cleanup costs from those responsible for the contamination.⁴² Congress also created a Superfund to pay for those cleanups for which no solvent responsible party could be found.⁴³ Congress structured CERCLA so that cleanup operations can be implemented independently of any imposition of liability or recovery of costs from liable parties.⁴⁴

CERCLA provides EPA with two types of response actions for treating a release of a hazardous substance into the environment.⁴⁵

40. See Healy, *supra* note 4, at 273 (citing *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)). A release, as defined in CERCLA, includes "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" 42 U.S.C. § 9601(22) (1994).

41. See Healy, *supra* note 4, at 273. CERCLA includes provisions for establishing liability for the costs of cleaning up hazardous waste sites. See Lucia A. Silecchia, *Judicial Review of CERCLA Cleanup Procedures: Striking a Balance to Prevent Irreparable Harm*, 20 HARV. ENVTL. L. REV. 339, 340 (1996).

The Superfund cleanup process begins with site discovery or notification to EPA of possible releases of hazardous substances Once discovered, sites are entered into the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS), EPA's computerized inventory of potential hazardous substance release sites. EPA then evaluates the potential for a release of hazardous substances from the site

42. EPA: *Superfund Sites Cleanup Process*, at <http://www.epa.gov/superfund/action/process/sfproces.htm> (last updated Mar. 28, 2001).

See Healy, *supra* note 4, at 273. The federal funding of CERCLA was increased by subsequent statutes to allow the federal government to begin cleanup of sites that need urgent attention. See *id.*

43. See generally 42 U.S.C. § 9611 (1994) (regulating use of Superfund money). The Superfund itself is "a trust fund fueled by taxes on the oil and petrochemical industries, corporations, and general revenues, to be used to clean up releases of hazardous substances into the environment." Alfred R. Light, *The Importance of "Being Taken": To Clarify and Confirm the Litigative Reconstruction of CERCLA's Text*, 18 B.C. ENVTL. AFF. L. REV. 1, 1 n.1 (1990) (discussing inconsistent interpretations of CERCLA).

44. See Healy, *supra* note 4, at 274 (stating "[t]he enforcement provisions and mechanisms included in CERCLA are based on a 'polluter pays' principle").

45. See *id.*; see also 42 U.S.C. § 9601(25) (1994) (defining terms "respond" and "response").

The first response option is a removal action, a short-term response intended to “prevent, minimize, stabilize, mitigate or eliminate the release or threat of a release.”⁴⁶ In order to allow for an immediate response and abatement of the problem, removal actions are usually limited in cost and time, and may be pursued without the completion of a substantial administrative process.⁴⁷ EPA’s preferred remedy, however, is a remedial action, a cleanup designed to achieve a permanent remedy at the site.⁴⁸ Due to substantial costs as well as a complex and time consuming process of funding, selecting and implementing remedial actions, only a small number of remedial actions have been completed since CERCLA’s enactment.⁴⁹

In the 1980s certain limitations of CERCLA became apparent.⁵⁰ Expedited CERCLA cleanups were rare events, as they were often delayed by lawsuits in which Potentially Responsible Parties (PRPs) challenged their liability and financial contribution.⁵¹ These lawsuits diverted EPA’s efforts and the Superfund’s finances away from the goals of the statute and toward litigation.⁵² Additionally, the time spent on litigation often affected the ultimate success

46. Healy, *supra* note 4, at 274 (quoting 42 U.S.C. § 9601(23) (defining term “removal”)). Removal actions may include forms of site control, installation of drainage controls, and removal of leaking drums. *See id.* at 274-75.

47. *See id.* at 275 (claiming EPA removal actions are one of CERCLA’s most valuable contributions to human health and environment); *see also* EPA: *Superfund Cleanup Figures*, at <http://www.epa.gov/superfund/action/process/mgmt/rpt.htm>. (last updated Mar. 28, 2001) (reporting over 6,400 removal actions were taken at hazardous waste sites to immediately reduce threat to public health and environment).

48. *See* Healy, *supra* note 4, at 275. “The 1986 Amendments to CERCLA establish a preference for permanent, treatment-based remedies.” *Id.* at 275-76 (citing 42 U.S.C. § 9621(b)(1) (1994)). Remedial actions include removal actions, as well as mechanisms to collect runoff, the treatment or incineration of hazardous substances at the site, and reasonable monitoring to ensure the adequacy of the remediation effort. *Id.* (citing 42 U.S.C. § 9601 (1994)).

49. *See id.* at 276 (reporting average cost of remedial action is between \$25 and \$30 million per site).

50. *See* Reiter, *supra* note 1, at 208 (citing Michael Oxley, *Superfund Reform: A Solution or a Sellout? Making It Work*, WASH. TIMES, Dec. 17, 1995, at B4 (blaming limitations on high costs and inefficient site construction work)).

51. *See* Reiter, *supra* note 1, at 208 (explaining such litigation and how incumbent costs diverted money away from CERCLA’s primary objective).

52. *See id.* “Nearly half of Superfund money is frittered away on litigation, bureaucracy and studies. Only 53 percent of funds are spent actually cleaning up sites. . . .” *Id.* (quoting Oxley, *supra* note 50, at B4).

of some cleanups, as the delays prevented attempts to minimize or mitigate the spreading of the released hazardous materials.⁵³

To reduce the frequency of dilatory litigation and other limitations of CERCLA, Congress amended the statute in 1986 when it passed the Superfund Amendments and Reauthorization Act (SARA).⁵⁴ SARA includes section 113(h), a provision that "places strict limitations on the timing of pre-enforcement judicial review of ordered cleanups."⁵⁵ The provision denies federal courts jurisdiction over challenges concerning removal and remedial actions before those actions are completed, unless the challenge is one of the five specific exceptions identified by the statute.⁵⁶ Section 113(h) reflects CERCLA's philosophy of "clean up first, litigate later."⁵⁷ Congress recognized that allowing immediate review of

53. *See id.* "[I]f courts permit challenges to proceed at ongoing CERCLA sites, cleanup efforts may be unacceptably delayed, having the potential effect of further contaminating those sites and threatening human lives." *Id.* at 209.

54. *See* Silecchia, *supra* note 41, at 340. SARA became effective on October 17, 1986. *See id.* at n.6.

55. *Id.* at 342. 42 U.S.C. § 9613(h) provides:

(h) Timing of Review

No Federal Court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title

42 U.S.C. § 9613(h) (1994).

56. *See* Healy, *supra* note 4, at 286. The exceptions to the preclusion of review are:

- (1) An action under section 9607 of this title to recover response costs or damages for contribution.
- (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
- (3) An action for reimbursement under section 9606(b)(2) of this title.
- (4) An action under 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
- (5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

42 U.S.C. § 9613(h).

57. Silecchia, *supra* note 41, at 351-53. Section 113(h) essentially ratified a line of earlier federal court decisions that foreclosed judicial review prior to government enforcement actions. *See id.* In § 113(h), Congress intended to enact a uniform rule barring pre-enforcement review of CERCLA cleanups so that they could be pursued without delay. *See id.*; *see, e.g.*, *J.V. Peters & Co., Inc. v. Administrator, EPA*, 767 F.2d 263, 264 (6th Cir. 1985) (holding CERCLA barred pre-enforcement review, even in absence of express provision); *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986); *Lone Pine Agency Comm. v. EPA*, 777 F.2d

proposed remedies would debilitate the central function of CERCLA and passed SARA to ensure the prompt cleanup of hazardous waste sites.⁵⁸

Courts confronted with challenges to EPA response actions have inconsistently applied section 113(h), disagreeing as to how broadly the section's bar on jurisdiction should be applied.⁵⁹ The provision has been interpreted broadly to provide an unconditional bar on all challenges to uncompleted response actions and narrowly to permit challenges to response actions that may cause additional or irreparable harm to the environment.⁶⁰ This range of interpretations highlights the competing interests of ensuring a quick cleanup in order to prevent spreading and further contamination, versus the goal of achieving an effective and adequate long-term cleanup.⁶¹ The threat exists that some EPA removal or remedial plans may achieve short-term goals at the expense of long-term goals, by causing irreparable harm to the environment, ineffective cleanups, and the perpetuation of social problems.⁶²

882, 888 (3d Cir. 1985) (holding it would be contrary to intent of Congress to allow challenge to EPA removal or remedial action before it is complete).

58. See Healy, *supra* note 4, at 291. The legislative history of SARA includes several explicit statements that Potentially Responsible Parties [hereinafter PRPs] should not be permitted to litigate the issue of CERCLA liability prior to an enforcement action. See 132 CONG. REC. S14895 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond) ("Citizens, including potentially responsible parties, cannot seek review of the response action or their potential liability for a response action - other than in an action for contribution - unless the suit falls within one of the categories provided in this section."); see also 132 CONG. REC. H9561 (daily ed. Oct. 8, 1986) (statement of Rep. Roe) ("When the essence of a lawsuit involves contesting the liability of the plaintiff for cleanup costs, the courts should apply the other provisions of § 113(h), which require such plaintiff to wait until the Government has filed a suit under §§ 106 or 107 to seek review of the liability issue.").

59. See Reiter, *supra* note 1, at 208 (explaining inconsistency is "due to widespread confusion over the question of whether § 113(h) broadly bars *all* legal challenges at ongoing CERCLA [sites] or whether the bar is narrowly limited to those challenges filed by PRPs intending to postpone their eventual financial contribution.").

60. See *id.*; see, e.g., Clinton County Comm'rs v. EPA, 116 F.3d 1018, 1022 (3d Cir. 1997) (holding all pre-enforcement challenges are barred); but see, e.g., Reeves Bros., Inc. v. EPA, 956 F. Supp. 665, 667 (W.D. Va. 1995) (holding constitutional challenges to EPA remedies may be heard prior to their completion).

61. See Reiter, *supra* note 1, at 209 (demonstrating element of time is basis for such tension).

62. See *id.* "If challenges to enforce all laws are unconditionally barred, then some CERCLA cleanups may be the source of more problems than they seek to resolve." *Id.*

A. All Pre-enforcement Challenges are Barred

A majority of federal courts have applied section 113(h) broadly, finding that the provision bars all challenges to uncompleted CERCLA remedies.⁶³ These courts stress the importance of section 113(h)'s primary objective, the prevention of delays to ongoing EPA ordered cleanups.⁶⁴ Section 113(h) has been found to bar all statutory and constitutional claims, regardless of whether they are challenges to CERCLA itself, remedial or removal actions under CERCLA, or the process through which the proposed actions were chosen.⁶⁵

1. Procedural Claims

Courts have applied the pre-enforcement bar on review of the process used by EPA in selecting removal and remedial actions.⁶⁶ In *Schalk v. Reilly (Schalk)*,⁶⁷ the Court of Appeals for the Seventh Circuit rejected the plaintiffs' assertions that claims challenging EPA's procedures of selecting a remedial action did not fall under the 113(h) bar.⁶⁸ The Court of Appeals stated that "challenges to the procedure employed in selecting a remedy nevertheless impact the implementation of the remedy and result in the same delays Congress sought to avoid by the passage of [section 113(h)]."⁶⁹

63. See Healy, *supra* note 4, at 302; see also *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3d Cir. 1991). The *Boarhead* court stated:

The limits § 113(h) imposes on a district court's jurisdiction are an integral part of Congress's overall goal that CERCLA free the EPA to conduct forthwith clean-up related activities at a hazardous site CERCLA's language shows Congress concluded that disputes about who is responsible for a hazardous site, what measures actually are necessary to clean-up the site and remove the hazard or who is responsible for its costs should be dealt with after the site has been cleaned up.

Id.

64. See Reiter, *supra* note 1, at 219 (discussing EPA's primary objective). Courts maintain that § 113(h)'s primary objective is to prevent the delay of EPA ordered cleanups at ongoing CERCLA sites regardless of whether the plaintiff is a PRP or a citizen asserting a claim with a citizen suit. See *id.*

65. For a discussion of courts' bar on pre-enforcement review of procedural, statutory, and constitutional challenges to CERCLA cleanup plans, see *infra* notes 66-80 and accompanying text.

66. See *Schalk v. Reilly*, 900 F.2d 1091, 1096 (7th Cir. 1991) (finding lack of jurisdiction to consider EPA's failure to comply with National Environmental Policy Act).

67. 900 F.2d 1091 (7th Cir. 1991).

68. *Id.* at 1095. Plaintiffs asserted that their request for an Environmental Impact Statement was merely procedural and did not fall under the § 113(h) bar. See *id.* at 1097.

69. *Id.* (suggesting challenges to cleanups will result in delays § 113 sought to avoid). In *Schalk*, EPA failed to comply with the procedural requirements of Na-

2. Statutory Claims

Courts are in almost unanimous agreement that the plain language of section 113(h) bars statutory challenges to CERCLA removal and remedial actions until they are completed.⁷⁰ In *Boarhead Corp. v. Erickson*,⁷¹ the Court of Appeals for the Third Circuit dismissed a claim that, if heard, would have impeded a remedial action despite the plaintiff's contention that the cleanup activities threatened archeological artifacts possibly in the soil at the site.⁷² The Third Circuit found section 113(h) was intended to permit EPA to "respond expeditiously to serious hazards without being stopped in its tracks by legal entanglement before or during the hazard cleanup."⁷³

3. Constitutional Challenges

Most courts have decided that all constitutional claims, whether they are challenges to CERCLA remedies or the statute itself, are barred by section 113(h).⁷⁴ In *Barnet Aluminum Corp v. Reilly (Barnet)*,⁷⁵ the Court of Appeals for the Sixth Circuit held that the District Court lacked jurisdiction to enjoin EPA on due process grounds from regulating plaintiffs' landfill.⁷⁶ The court found that neither the legislative history nor the statutory language supported plaintiffs' argument that they could bring constitutional claims against EPA for its administration of CERCLA or against

tional Environmental Policy Act by not preparing an environmental impact statement for the CERCLA cleanup site. *See id.*

70. *See Broward*, 157 F. Supp. 2d 1329, 1338 (S.D. Fla. 2001) (citing *Concerned Citizens of Agric. St. Landfill, Inc. v. Browner*, No. Civ.A.98-0124, 1998 WL 104656, at *6 (E.D. La. Mar. 9, 1998). *See also* *Voluntary Purch. Groups, Inc. v. Reilly*, 889 F.2d 1380, 1388 (5th Cir. 1989) (holding district court did not have jurisdiction over declaratory judgment action against EPA where § 113(h) clearly forecloses pre-enforcement review).

71. 923 F.2d 1011 (3d Cir. 1991).

72. *See id.* at 1023 (denying claims EPA response action violated National Historic Preservation Act).

73. *Id.* at 1019 (noting intent of § 113(h)). The court, however, did note that prior to the approval of the expenditure of any federal funds on CERCLA cleanups, it must take into account the effect of the undertaking on any district site, building, structure, or object that is included in or eligible for inclusion in National Register. *See id.* at 1013 n.2.

74. *See Broward*, 157 F. Supp. 2d at 1339; *see also* *Aztec Minerals Corp. v. United States EPA*, No. 98-1380, 1999 WL 969270, at *17 (10th Cir. Oct. 25, 1999) (holding district court lacked jurisdiction over plaintiffs' claims that EPA's actions pursuant to CERCLA violated due process clause of Fifth Amendment).

75. 927 F.2d 289 (6th Cir. 1991).

76. *Id.* (holding district court lacked jurisdiction to enjoin EPA on due process grounds). Plaintiff challenged EPA's proposed listing of his property on National Priority List. *See id.*

CERCLA itself.⁷⁷ Courts have reasoned that an injured party's due process rights are not violated by CERCLA's pre-enforcement foreclosure of constitutional challenges because the statute still leaves open the possibility of a post-enforcement hearing.⁷⁸ The Court of Appeals for the Tenth Circuit in *Hanford Downwinders Coal, Inc. v. Dowdle (Hanford Downwinders)*⁷⁹ went even further, finding the application of section 113(h) would not violate the Constitution even if a possibility existed that plaintiffs' claims would never be heard in a federal court.⁸⁰

B. Section 113(h) Does Not Bar All Pre-enforcement Review

In contrast to broad applications of section 113(h)'s bar, several courts have expressly or impliedly concluded that, under certain legal and factual circumstances, review of challenges to CERCLA and its administration should be available prior to implementation of the cleanup.⁸¹ A number of courts have permitted pre-enforcement review of constitutional challenges to CERCLA as well as challenges to the administration of CERCLA.⁸² Courts have also suggested the legality of pre-enforcement review of non-liability based claims when they raise certain policy considerations.⁸³ A minority of courts have favored immediate review when policy considerations, such as the protection of public health and the

77. See *id.* at 292 (agreeing with EPA's argument that Congress passed § 113(h) to foreclose interpretations allowing pre-enforcement review of constitutional challenges).

78. See *id.* at 295-96 (noting Congress did not completely foreclose parties from obtaining review of EPA actions, but merely delayed such hearings).

79. 71 F.3d 1469, 1484 (9th Cir. 1995)

80. *Id.* In *Hanford Downwinders*, plaintiffs sought an injunction to prevent the Agency for Toxic Substances & Disease Registry [hereinafter ATSDR] from spending any further funds on Hanford, a federal Superfund site, until the agency completed required health assessment of the location. See *id.*

81. See Healy, *supra* note 4, at 307. Some "courts have reached different conclusions about the extent to which § 113(h) forecloses immediate judicial review of CERCLA claims . . . with a minority of courts deciding that immediate review is available because delayed review would be inadequate." *Id.*

82. See, e.g., *Washington Park Lead Comm., Inc. v. EPA*, No. 2:98CV421, 2000 U.S. Dist. LEXIS 8011 (E.D. Va. Dec. 1, 1998) (holding residents of predominantly African-American low-income housing project may assert claims of discrimination and continued segregation against EPA, city and housing authority).

83. See, e.g., *Cabot Corp. v. EPA*, 677 F.Supp. 823, 823 (E.D. Pa. 1988) (stating although PRPs cannot rely on exception in § 113(h)(4) to avoid bar against pre-enforcement review of claim challenging liability, health based claims should not be barred).

environment, the speed of the cleanup process, and the inadequacy of delayed review are at issue.⁸⁴

1. All Constitutional Claims are Allowed

In *Reeves Bros., Inc. v. EPA* (*Reeves Bros.*)⁸⁵ and *Washington Park Lead Committee, Inc. v. EPA* (*Washington Park*),⁸⁶ two district courts in Virginia held that section 113(h)'s prohibition of pre-enforcement review does not extend to constitutional challenges of EPA removal and remedial actions.⁸⁷ The plaintiff in *Reeves Bros.* alleged that EPA adopted a practice of warrantless searches of private property in violation of the Fourth Amendment.⁸⁸ The District Court for the Western District of Virginia found that although section 113(h) clearly prohibits statutory claims, section 113(h) does not extend to constitutional challenges of EPA actions pursuant to the statute's commands.⁸⁹ In *Washington Park* the plaintiffs brought a class action suit challenging a remedial plan endorsed by EPA that called for the removal and relocation of all privately owned housing and provided no relief for the residents of low-income areas.⁹⁰ The District Court for the Eastern District of Virginia held that the aggrieved residents could assert claims of unconstitutional discrimination against EPA based on the selected remedy.⁹¹

84. See Healy, *supra* note 4, at 304 (suggesting there is no clear congressional intent to foreclose pre-enforcement review of citizen suit claims that are unrelated to CERCLA liability).

85. 956 F. Supp. 665 (W.D. Va. 1995) [hereinafter *Reeves Bros.*].

86. No. 2:98CV421, 1998 WL 1053712 (E.D. Va. Dec. 1, 1998).

87. See *id.*; see also *Reeves Bros.*, 956 F. Supp. 665, 674 (W.D. Va. 1995). However, the *Reeves Bros.* and *Washington Park* decisions do not have much precedential value because they are district court decisions within the same circuit and neither has been followed by other circuits. See *Broward*, 157 F. Supp. 2d 1329, 1343 (S.D. Fla. 2001) (finding decisions did not provide adequate support for Plaintiffs' position).

88. *Reeves Bros.*, 956 F. Supp. at 674. The plaintiff sued EPA and six of its employees for inspecting his property without ever obtaining consent or a warrant. See *id.* at 667-68.

89. See *id.* at 674 (stating interpretation of CERCLA that prevents review of constitutionality of EPA's actions would raise serious constitutional questions).

90. *Washington Park*, 1998 WL 1053712, at *2. The remedial plan called for removal and reallocation of all residents of privately owned residential property, while the residents of the Washington Park housing project were to remain in the cleanup area. See *id.*

91. See *id.* at *9 (stating plaintiffs could bring equal protection claim against site owner for endorsing and implementing potentially discriminatory cleanup remedy).

2. *The First Circuit's Test*

The First Circuit, in *Reardon v. United States (Reardon)*,⁹² developed a test for determining whether section 113(h) bars constitutional challenges to CERCLA cleanup plans.⁹³ *Reardon* drew on a distinction between constitutional challenges to CERCLA itself and challenges to the constitutionality of the remedy chosen by EPA under the authority of CERCLA.⁹⁴ According to the First Circuit, claims of the latter type are outside the jurisdiction of federal courts, while suits challenging the constitutionality of the statute are not automatically barred.⁹⁵ The plaintiff in *Reardon* claimed that EPA's imposition of a CERCLA lien on his land without a hearing violated the Due Process Clause of the Fifth Amendment.⁹⁶ The court noted that the claim was not a challenge to EPA's administration of a remedial or removal action, but rather a constitutional challenge to the statute itself.⁹⁷ The court determined that challenges to CERCLA itself are not barred because Congress did not express a clear intent to preclude such challenges.⁹⁸ However, the court maintained that "a constitutional challenge to EPA administration of the statute may be subject to [section 113(h)'s] strictures . . . [we] find only that a constitutional challenge to the CERCLA statute is not covered by [section 113(h)]."⁹⁹

3. *Policy Considerations*

A few courts have recognized an implicit exception to the general jurisdictional bar of section 113(h), arguing that in certain circumstances a removal of the bar may be necessary to accomplish CERCLA's ultimate objectives of protecting the natural environ-

92. 947 F.2d 1509, 1515 (1st Cir. 1991) (en banc).

93. *Id.* at 1511 (recognizing distinctions between constitutional challenges to CERCLA).

94. *See id.* at 1515. "We see nothing in this discussion which would indicate an intent to divest federal courts of jurisdiction to consider a claim that the provisions of CERCLA itself authorize deprivations of property without due process of law." *Id.* at 1516.

95. *See id.* at 1515 (noting literal language of § 113(h) bars challenges to EPA's administration of CERCLA, not challenges to statute itself).

96. *See id.* EPA imposed a lien on plaintiff's property in an attempt to recover costs incurred for the removal of hazardous substances from plaintiff's property. *See id.*

97. *See Reardon*, 947 F.2d at 1514 (stating "the [plaintiff's] due process claim is not a challenge to the way in which EPA is administering the statute . . . [r]ather, it is a challenge to the CERCLA statute itself . . .").

98. *See id.* at 1515. "We do not believe that the statute expresses a clear congressional intent to preclude the type of constitutional claim the [plaintiffs] are making" *Id.*

99. *Id.* (finding court has jurisdiction over plaintiff's claims).

ment and saving human lives.¹⁰⁰ This minority view does not believe that the delay of a cleanup plan should trigger an automatic dismissal of a challenge.¹⁰¹ "Rather, courts should preliminarily determine whether the cleanup itself or the challenge modifying that cleanup will more likely cause deleterious environmental and health impacts."¹⁰²

In *United States v. Princeton Gamma-Tech, Inc. (Princeton)*,¹⁰³ a decision that was eventually overturned, the Court of Appeals for the Third Circuit held that it would lift the jurisdictional bar mandated by section 113(h) if the party bringing the suit could demonstrate a bona fide allegation of irreparable injury to public health or the environment.¹⁰⁴ The Third Circuit contended that a bar foreclosing review of a health-based claim, prior to implementation of a cleanup, could not possibly be Congress's intent because it would violate the purpose of CERCLA.¹⁰⁵ The court distinguished the

100. See Reiter, *supra* note 1, at 223 (arguing implicit exception should be applied even if challenge calls into question EPA's selected mode of cleanup).

101. See *id.* "Ultimately, such an approach will simultaneously serve the general objectives of CERCLA and the specific objectives of [section] 113(h)." *Id.*

102. *Id.* An example of a remedy that may cause additional harm to the environment "may be illustrated by an extreme scenario that has the EPA deciding to take leaking drums containing a highly toxic substance from a dump site and to empty them into a nearby lake, thus causing permanent damage to public health and environment." Silecchia, *supra* note 41, at 343-44 (quoting *United States v. Princeton Gamma-Tech Inc.*, 31 F.3d 138, 146 (3d Cir. 1994)).

103. 31 F.3d 138 (3d Cir. 1994) (overruled by *Clinton County Comm'rs v. EPA*, 116 F.3d 1018 (3d Cir. 1997)).

104. *Princeton*, 31 F.3d at 140. The court stated, "[W]e conclude that when the EPA sues to recover initial expenditures incurred in curing a polluted site, a district court may review a property owner's bona fide allegations that continuance of the project will cause irreparable harm to public health or the environment and, in appropriate circumstances, grant equitable relief." *Id.*

105. See *id.* "Indeed, a thorough review of the legislative history reveals no evidence whatsoever that Congress intended anything other than a judicial review of completed response actions under the citizens' suit provision." *Id.* This narrow interpretation of the scope of review preclusion for health-based claims also receives inferential support from a house report, which ties Congressional concerns about litigation delays to its concern that public health will be threatened. See H.R. REP. NO. 99-253, pt. 5 at 25 (1985).

According to that house report:

The purpose of the review preclusion provision is to ensure that there will be no delays associated with a legal challenge of the particular removal or remedial action selected under 1040 or secured through administrative order or judicial action under section 106. Without such a provision, responses to releases or threatened releases of hazardous substances could be unduly delayed, thereby exacerbating the threat of damage to human health or the environment. In a case where delay in implementing the cleanup would likely result in public health improvements, the applicability of the bar against early review is more doubtful.

Id.

case from conflicting circuit decisions on factual determinations, asserting that other courts had yet to be confronted with a bona fide assertion of irreparable environmental damage resulting from CERCLA's policies.¹⁰⁶

Nevertheless, the court's rationale in *Princeton* was not followed, and the decision was ultimately overruled.¹⁰⁷ In *Clinton County Commissioners v. EPA (Clinton County)*,¹⁰⁸ the Third Circuit overruled the central holding in *Princeton*, and stated, "Congress intended to preclude all suits against the EPA remedial actions under CERCLA until such actions are complete, regardless of the harm that the actions might allegedly cause."¹⁰⁹

However, the holding in *Princeton* is supported by *Cabot Corp. v. EPA (Cabot)*.¹¹⁰ In dicta, the *Cabot* court stated that jurisdiction should be available for health-based claims immediately after a cleanup plan is selected.¹¹¹ The District Court for the Eastern District of Pennsylvania concluded that the citizen-suit exception, section 113(h)(4), made the preclusion provision ambiguous and that the ambiguity should be resolved in favor of permitting early review of health-based CERCLA claims.¹¹² The court's rationale rested on legislative history, which indicated that Congress intended this result and only pre-cleanup review would ensure adequate review of a claim of irreparable injury.¹¹³

106. See *Princeton*, 31 F.3d at 144 (distinguishing factual circumstances of *Princeton* from those of *Schalk v. Reilly*, 900 F.2d 1095 (7th Cir. 1990)).

107. See *Clinton County*, 116 F.3d 1018, 1025 (3d Cir. 1994) "We are less convinced than was the *Princeton* . . . majority, however, that the absolute limitation on judicial review established by § 9613(h)(4) is either absurd or contrary to the objectives of CERCLA." *Id.* at 1025.

108. 116 F.3d 1018 (3d Cir. 1994).

109. *Id.* at 1022 (emphasizing when statutory language is clear it is not function of reviewing courts to act as super-legislatures and second guess policy decisions of Congress).

110. 677 F. Supp. 823 (E.D. Pa. 1988); see also Healy, *supra* note 4, at 306 (citing *Cabot Corp. v. EPA*, 677 F. Supp. 823 (holding court could not maintain pre-enforcement suit under § 113(h)(4) where plaintiffs were alleging EPA had failed to limit costs of cleanup)).

111. See Healy, *supra* note 4 at 306. Thus the *Cabot* and *Princeton* courts shared the view that in a health-based suit it would be objectionable to permit judicial review only after the cleanup has been completed. See *id.*

112. See *Cabot*, 677 F. Supp. at 828-30 (applying § 113(h)(4) to current action).

113. See *id.* at 829 (summarizing relevant legislative history). During the debate that preceded final enactment of SARA, Representative Glickman sought to foreclose an interpretation of § 113(h) that would permit immediate review of a claim because it was health-based. See *id.* Representative Glickman instead compared a citizen's health-based claim to a PRP's premature liability claim and argued that they are substantially the same because they delay cleanups. See 132 CONG. REC. H9561 (daily ed. Oct. 8, 1986) (statement of Rep. Glickman).

IV. NARRATIVE ANALYSIS

After determining that it lacked subject matter jurisdiction over Plaintiffs' claims, the District Court of Southern Florida in *Broward* granted EPA's and Fort Lauderdale's motion to dismiss.¹¹⁴ The court found merit in Defendants' argument that section 113(h) of CERCLA divests federal courts of jurisdiction over Plaintiffs' challenge to the ongoing cleanup plan at the Wingate Site.¹¹⁵ The court rejected Plaintiffs' claim that CERCLA's bar against pre-enforcement judicial review was inapplicable because their claims were constitutional challenges.¹¹⁶ In its decision, the court relied heavily on Congress's intention in enacting the timing provision, which was to prevent time-consuming litigation that might interfere with cleanups of hazardous waste sites.¹¹⁷ Despite Plaintiffs' allegations of de jure segregation, the court found that Plaintiffs' claims, in their essence, were only challenges to the consent decree's ability to adequately remedy the environmental problems of the Wingate Site.¹¹⁸

If the remedy has to be rebuilt, the potentially responsible parties may have to pay twice for the cleanup of one site. Notwithstanding these arguments, the conferees decided to ensure expeditious cleanups by restricting such pre-implementation review . . . Clearly the conferees did not intend to allow any plaintiff, whether the neighbor who is unhappy about the construction of a toxic waste incinerator in the neighborhood, or the potentially responsible party who will have to pay for its construction, to stop a cleanup by what would undoubtedly be a prolonged legal battle.

Id.

114. *Broward*, 157 F. Supp. 2d 1329, 1337 (S.D. Fla. Aug. 9, 2001). The court dismissed Plaintiffs' claims without prejudice pursuant to FED. R. Civ. P. 12(b)(1). *See id.*

115. *See id.* The challenge was to the remedial plan embodied in the consent decree filed in *Fort Lauderdale*. *See id.*

116. *See id.* Plaintiffs relied on *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (holding CERCLA did not deprive court of jurisdiction to hear constitutional challenge to lien); *Washington Park Lead Comm., Inc. v. EPA*, 1998 WL 1053712 (E.D. Va. 1998) (holding § 113(h)'s bar does not preclude constitutional claims); and *Reeves Bros. v. EPA*, 956 F. Supp. 665 (W.D. Va. 1995) (holding § 113(h) did not bar court's jurisdiction over plaintiff's constitutional challenge to actions of EPA in executing CERCLA's commands) to support its argument that its Due Process and Equal Protection challenges could be heard. *See Broward*, 157 F. Supp. 2d at 1337.

117. *See Broward*, 157 F. Supp. 2d at 1338 (stating only relief Plaintiffs sought was to put stop to remedial action, and such relief would directly interfere with cleanup plan).

118. *See id.* Although the Plaintiffs insisted their claims were challenges under the Constitution only, the court determined they were merely challenges to a CERCLA-based remedy.

In truth the plaintiffs claims are nothing more than challenges to a consent decree that was implemented under CERCLA. This conclusion is buttressed by the remedies the plaintiffs seek in their complaint, adaptation of the state's stricter environmental standards, rather than those

The court summarily dismissed Plaintiffs' statutory claims that Defendants' actions violated Civil Rights Acts and the Fair Housing Act.¹¹⁹ The District Court of Southern Florida found unanimous agreement among the circuits that supported its holding that the plain language of section 113(h) barred Plaintiffs' statutory claims.¹²⁰ The court primarily relied on *Boarhead*, a decision that precluded pre-enforcement review of EPA cleanup plans that allegedly violated the National Historic Preservation Act.¹²¹

The District Court of Southern Florida determined that the only relevant issue to be decided was whether it had jurisdiction over Plaintiffs' constitutional challenges to the cleanup plan.¹²² The court found that a split of authority existed on the question of whether section 113(h) divests district courts of subject matter jurisdiction over constitutional challenges to CERCLA cleanup plans.¹²³ The court recognized three approaches other courts have taken when deciding this issue, and analyzed Plaintiffs' claims under each.¹²⁴ First, the court considered the majority view, that all constitutional claims, like statutory claims, are barred by the plain language of section 113(h).¹²⁵ Second, the court considered the First Circuit's test that examines a plaintiff's claims and determines

used in the consent decree; a declaration that the actions of the defendants, as embodied by the consent decree, are unconstitutional; and the prevention of the plaintiffs' exposure to contaminants.

See id. at 1338 n.12.

119. *See id.* at 1344-45. Counts IV and V alleged violations of Titles VI and VIII of the Civil Rights Act of 1964 and count VI alleged violations of the Fair Housing Act. *See id.*; *see also, supra* note 35 for a description of the counts.

120. *See Broward*, 157 F. Supp. 2d at 1344-45 (asserting plain language of § 113(h) bars plaintiffs' statutory claims).

121. *See id.* at 1338 (citing *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir. 1991); *Concerned Citizens of Agric. St. Landfill Inc. v. Browner*, No. Civ.A.98-0124, 1998 WL 104656, at *15 (E.D. La. Mar 9, 1998) (opinions holding challenges to cleanup procedures brought under National Historic Preservation Act and Fair Housing Act were barred by plain language of § 113(h)).

122. *See id.* At issue were only count I (violation of Fifth Amendment) count II (violation of Thirteenth Amendment and 42 U.S.C. § 1983), and count VII (violation of Fifth Amendment). *See id.* *See* note 35 *supra* for description of the counts.

123. *See Broward*, 157 F. Supp. 2d at 1339 (citing *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991); *Washington Park Lead Comm., Inc. v. EPA*, No. 2:98CV421, 1998 WL 1053712 (E.D. Va. Dec. 1, 1998); *Reeves Bros. v. EPA*, 956 F. Supp. 665 (W.D. Va. 1995)).

124. *See Broward* at 1338-45 (reviewing parties' arguments, complaint, and relevant case law).

125. *See id.* at 1339 (citing *Aztec Minerals Corp. v. EPA*, 198 F.3d 257 (10th Cir. 1999) (holding § 113(h)'s jurisdictional bar applied to constitutional challenges to EPA actions); *Barnet Aluminum Corp. v. Reilly*, 927 F.2d 289 (6th Cir. 1991) (holding district court lacked jurisdiction to enjoin EPA, on due process grounds, from regulating plaintiff's landfill)).

whether the claims are challenging the administration of CERCLA or CERCLA itself.¹²⁶ Finally, the court examined the case in light of the two district court decisions, *Reeves Bros.* and *Washington Park*, that held the view argued by Plaintiffs - that no constitutional challenges are precluded by section 113(h).¹²⁷

The court noted that the Court of Appeals for the Eleventh Circuit had not yet had an opportunity to discuss whether section 113(h) applies to constitutional challenges to CERCLA cleanup plans.¹²⁸ However, the court found Eleventh Circuit decisions that, at the very least, precluded pre-enforcement judicial review over all statutory claims.¹²⁹ The court noted that the general language used by the Eleventh Circuit in these decisions supported a broad interpretation of section 113(h), and that the Eleventh Circuit is likely to agree with other circuits that find that section 113(h) bars judicial review over all constitutional challenges to CERCLA.¹³⁰

The court nonetheless refrained from holding that constitutional challenges are barred by section 113(h).¹³¹ Because the court defined the issue narrowly and only asked whether federal courts have jurisdiction to review a challenge to EPA's administration of CERCLA, it was not necessary to determine whether the timing provision barred challenges to the statute itself.¹³² The court found that because Plaintiffs' claims were merely challenges to the

126. See *id.* (citing *Reardon*, 947 F.2d 1509).

127. See *id.* at 1342 (citing *Washington Park*, No. 2:98CV421, 1998 WL 1053712; and *Reeves Bros.*, 956 F. Supp. 665) (examining constitutional challenges).

128. See *Broward*, 157 F. Supp. 2d at 1339. However, the Eleventh Circuit found that such a bar is constitutional. See *Dickerson v. Administrator, EPA*, 834 F.2d 974, 978 (11th Cir. 1987) (holding due process does not require access to courts before final administrative action).

129. See *Broward*, 157 F. Supp. 2d at 1340 (citing *Alabama v. EPA*, 871 F.2d 1548 (11th Cir. 1989) (holding district court lacked subject matter jurisdiction over plaintiffs claims brought under Administrative Procedure Act)).

130. See *id.* at 1341. The *Dickerson* court stated, "federal courts do not have subject matter jurisdiction for pre-enforcement reviews of EPA removal actions pursuant to section 9604." *Dickerson*, 834 F.2d at 977.

131. See *Broward*, 157 F. Supp. 2d 1329, 1342. Although the court refrained from making such a statement, it appeared to support the proposition that all constitutional challenges are barred by § 113(h). See *id.*

132. See *id.* at 1342. The court rejected Plaintiffs' argument that challenges were more than challenges to the remedial action, stating:

[t]he plaintiffs' complaint repeatedly states that the defendants have implemented a "policy" of de jure segregation, but the plaintiffs can point to no practice other than the deficient cleanup embodied by the consent decree. Their present claim is nothing more than a direct challenge to the Wingate cleanup remedy selected by the defendants

Id. at 1344.

adequacy of an EPA remedy, review would be barred under both the majority approach and the First Circuit's test in *Reardon*.¹³³

Finally, the court rejected the reasoning of the two Virginia district court decisions, *Reeves Bros.* and *Washington Park*, which held that all constitutional challenges could be heard.¹³⁴ The court did not find Plaintiffs' reliance on the cases persuasive because they were district court decisions not binding on this court and not followed in other circuits.¹³⁵ The court recognized that Plaintiffs' claims were similar to those advanced by the plaintiffs in *Washington Park*; however, it found the facts supporting discrimination in *Washington Park* more severe than those in *Broward*, and so concluded this issue did not require a similar remedy.¹³⁶

V. CRITICAL ANALYSIS

The District Court of Southern Florida's interpretation of section 113(h)'s bar on pre-enforcement review is a classic example of a court missing the forest for the trees.¹³⁷ The court's determination that section 113(h) barred Plaintiffs' claims relied too heavily on the specific goals of the provision and not enough on the general goals of the provision and CERCLA itself.¹³⁸ The court should have interpreted section 113(h) and applied it to Plaintiffs' claims in the context of the entire statute and not in the vacuum of the specific provision.¹³⁹ The court supported its decision to bar pre-enforcement review of Plaintiffs' claims with a narrow interpreta-

133. See *id.* at 1342. The court stated:

it is not necessary to decide whether the Eleventh Circuit would follow the reasoning of the Third and Sixth Circuits, which . . . bar all statutory and constitutional challenges, or whether it would adopt the more analytical approach of the First Circuit in *Reardon*. This is because the plaintiffs' constitutional claims in this case would be barred under either approach.

Id.

134. See *id.* at 1343 (observing § 113(h)'s bar does not create constitutional questions because it is not permanent impediment to judicial review).

135. See *id.* (noting "*Washington Park* is the only reported case that has relied on *Reeves Brothers* as persuasive authority, and *Washington Park* has not been cited by any other reported decision.").

136. See *Broward*, 157 F. Supp. 2d at 1342-43 (distinguishing *Broward* from *Washington Park* because Plaintiffs in *Broward* did not claim they were treated differently than other Wingate residents).

137. See generally *Broward*, 157 F. Supp. 2d 1329 (focusing on delay that would result if pre-enforcement review were granted).

138. See generally *Broward*, 157 F. Supp. 2d 1329. For a further discussion of the general goals of CERCLA see notes 2-5 *supra* and accompanying text.

139. See *id.* at 1342-43 (deciding relief sought by Plaintiffs must be denied because such relief would directly interfere with CERCLA cleanup plan).

tion of section 113(h).¹⁴⁰ By focusing too closely on the facial intentions of section 113(h) (the prevention of dilatory litigation) the court compromised the general goal of the provision and the ultimate goal of CERCLA - the protection of human life and the environment.¹⁴¹

It is true that pre-enforcement review would have delayed the cleanup of the Wingate Site in the short run.¹⁴² An inadequate cleanup, however, threatens the long-term goal of a complete cleanup, and delays the site's removal from the NPL.¹⁴³ If the cleanup is not adequate, EPA will have to repeat the process at the expense of human health, the environment, and those responsible for the cost of the cleanup.¹⁴⁴ The court correctly recognized that Congress enacted section 113(h) to ensure prompt cleanups, but lost sight of Congress's reason for securing such a goal.¹⁴⁵ If the court interpreted section 113(h)'s prompt cleanup goal as a means to protect public health, it would have recognized that the provision loses some of its effectiveness when it bars pre-enforcement review of legitimate health-based claims brought by affected parties.¹⁴⁶

The court ignored the policy considerations raised in *Princeton* and *Cabot*, and answered the question of whether the constitutional nature of Plaintiffs' claims exempted them from section 113(h)'s bar.¹⁴⁷ Defining the issue this way, the court missed the broader

140. See generally *Broward*, 157 F. Supp. 1329 (failing to recognize repercussions of inadequate cleanup plan on human health and environment).

141. See *id.*

142. See Silecchia, *supra* note 41, at 374 (implying grant of review would likely entail injunctive relief).

143. See EPA: How Sites are Deleted from the NPL, at http://www.epa.gov/superfund/programs/npl_hrs/nploff.htm (last updated Mar. 28, 2001) (stating only after release poses no significant further threat to public health or environment can site be taken off NPL).

144. See 132 CONG. REC. H9561 (daily ed. Oct. 8, 1986) (statement of Rep. Glickman) (stating "if the remedy is not adequate the neighbors may be injured and the potentially responsible parties . . . may have to pay twice for the cleanup of the same site.").

145. See generally *Broward*, 157 F. Supp. 2d 1329 (failing to recognize ultimate reason for enactment of SARA).

146. See Healy, *supra* note 4, at 339 (noting conflict between public health risks created by cleanups themselves and those created while cleanup is delayed in litigation).

147. See *Broward*, 157 F. Supp. 2d at 1337-38 (accepting Defendant's argument supporting dismissal of claim based on lack of subject matter jurisdiction due to CERCLA's bar).

environmental concerns raised by Plaintiffs' claims.¹⁴⁸ As a result, the court failed to consider whether the remedy was in line with the goal of CERCLA and if it was the best available long-term solution for the remediation of the site.¹⁴⁹

Congress enacted section 113(h) to prevent dilatory litigation, but it was not Congress that took the initiative in the fight against PRPs attempting to avoid or delay liability and financial contribution.¹⁵⁰ When Congress constructed section 113(h), it essentially codified prior court decisions that read into CERCLA an implied pre-enforcement bar.¹⁵¹ These courts believed that such an interpretation would prevent delays in cleanups and further the goals of CERCLA.¹⁵² This interpretation of CERCLA and Congress's later adoption of section 113(h) has had the desired effect of making courts and the public more aware of the necessity of prompt cleanups and more vigilant of parties trying to delay them in bad faith.¹⁵³ The provision, as it has been interpreted, is over-inclusive, because it bars claims that, if heard, would further CERCLA's ultimate goals.¹⁵⁴ It is now time for courts to once again take the initiative and reverse this trend.

In *Cabot*, the District Court for the Eastern District of Pennsylvania first recognized the need for a change in section 113(h)'s application, suggesting that federal courts should have jurisdiction over health-based claims immediately after a cleanup plan is se-

148. *See id.* The court discussed at length the impact of the constitutional nature of Plaintiffs' claims while failing to examine the impact of an inadequate cleanup. *See id.* at 1339-44.

149. *See id.* (failing to make exception for Plaintiffs' health based claims).

150. *See Healy, supra* note 4, at 289 (noting "Congress enacted § 113(h) to confirm and build upon existing case law.").

151. *See Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1387-88 (5th Cir. 1989) (stating "[s]ection 113(h) . . . codified earlier case law limitations on 'pre-enforcement' review of remedial and removal actions."); *see also Reardon v. United States*, 731 F. Supp. 558, 564 (D. Mass. 1990), *rev'd in part, en banc*, 947 F.2d 1509 (1st Cir. 1991) (stating "[s]ection 113(h), enacted as part of the SARA amendments, codified this prior case law prohibiting the pre-enforcement review of EPA cleanup actions.").

152. *See J.V. Peters & Co., Inc. v. Administrator, EPA*, 767 F.2d 263, 264-65 (6th Cir. 1985) (finding "allowance of a cause of action prior to a response action would debilitate the central function" of CERCLA).

153. *See Healy, supra* note 4, at 352. "The CERCLA review preclusion has been very effective in meeting its intended purpose – foreclosing the litigation of CERCLA liability issues prior to a government enforcement action." *Id.*

154. *See Hanford Downwinders Coalition, Inc. v. Dowdle*, 841 F. Supp. 1050, (E.D. Wash. 1993), *aff'd*, 71 F.3d 1469 (9th Cir. 1995) (finding Congress did not authorize health-related exception to general jurisdictional bar).

lected.¹⁵⁵ The Third Circuit, in *Princeton* followed the reasoning in *Cabot*, and was willing to lift the jurisdictional bar on review if the plaintiff could demonstrate that the proposed cleanup plan would cause irreparable harm to public health or the environment.¹⁵⁶ The Third Circuit Court of Appeals in *Princeton* was fully aware of the inconsistency and the potential conflict between the general goals of CERCLA and the specific goals of section 113(h).¹⁵⁷ Unfortunately, the enlightened approach of *Cabot* has not been followed; moreover, *Princeton* was overruled in *Clinton County*.¹⁵⁸

The Third Circuit in *Clinton County* was, to an extent, correct when it stated that Congress determined that delays resulting from challenges to remedial actions were a greater risk than the risk of EPA errors in remedial selections.¹⁵⁹ However, Congress enacted section 113(h) in an era dominated by dilatory litigation, and at a time when concern for the environment was not as high as it is today.¹⁶⁰ In contrast, today the courts and the public are more aware of the need to protect the environment and of the bad faith tactics used by PRPs attempting to avoid liability and financial contribution.¹⁶¹ In light of the changed attitude towards the environment, the strict application of the provision can be viewed, perhaps, as an overreaction, a short-term solution to a problem of the

155. *Cabot Corp. v. EPA*, 677 F. Supp. 823, 829-30 (E.D. Pa. 1988) (addressing allegations that response plan might harm environment).

156. *United States v. Princeton Gamma-Tech, Inc.*, 31 F.3d 138, 146-49 (3d Cir. 1994) (arguing review of health-based claims is not barred until at least particular phase of cleanup is completed).

157. *See id.* at 148. "An absolute . . . 'bar is contrary to the objectives of CERCLA and results in the evisceration of the right to remedy envisioned by section 113(h)[(4)]." Reiter, *supra* note 1, at 224 n.73.

158. *See Reiter, supra* note 1, at 224. *Princeton* was difficult to follow and easy to overrule because it was fact specific and based on policy analysis rather than the language or the history of the statute. *See id.* at 224-25.

159. *Clinton County Comm'rs v. EPA*, 116 F.3d 1018, 1022 (3d Cir. 1997) (recognizing at time of § 113(h)'s enactment, absolute bar on pre-enforcement review was Congress's intent, regardless of harms that may arise).

160. *See Silecchia, supra* note 41, at 368 (referring to 1980s when completed remedial actions were scarce).

161. *See EPA: EPA Office/Program History*, at http://www.epa.gov/ocfo/finstatement/2000ar/ar00_3dec.pdf (May 21, 2001). The public and government's heightened interest in protecting the environment is evidenced by the large number of environmental statutes that have been enacted since the passage of SARA. *See id.*

past.¹⁶² Accordingly, a selected lift of the bar will aid in protecting, not harming, the environment and human health.¹⁶³

Nevertheless, reviewing courts should be wary of dilatory tactics.¹⁶⁴ Courts should only permit challenges to proceed after claimants bear the heavy burden of proving that the litigation is not a delay tactic or an attempt to avoid liability.¹⁶⁵ Courts must weigh the costs of delaying the cleanup against the added benefit of the changed plan and also be aware of challenges that only raise a legitimate difference of opinion about the preferred remedy for a particular site.¹⁶⁶

In *Broward*, the district court passed on the opportunity to interpret section 113(h) in a way that would best reflect the goals of CERCLA.¹⁶⁷ Although there is little precedent supporting a lift of the bar, protection of the environment and human health would have been a good foundation on which to support such a holding.¹⁶⁸

VI. IMPACT

The holding in *Broward* added to a line of decisions refusing to create a health-based exception to the jurisdictional bar of section 113(h).¹⁶⁹ In the short run, the *Broward* decision will make it more difficult for parties adversely affected by inadequate CERCLA reme-

162. In the more environmentally conscious era that exists today, the imposition of fines and penalties upon parties trying to interfere with CERCLA cleanups would provide an effective way to deter dilatory litigation and still allow for legitimate health-based challenges. See Brian Patrick Murphy, Note, *CERCLA's Timing of Review Provision: A Statutory Solution to the Problem of Irreparable Harm to Health and the Environment*, 11 FORDHAM ENVTL. L.J. 587, 621 (2000).

163. See *id.* at 628 (noting allowing citizens and PRPs to challenge potentially harmful cleanups would be beneficial to environment).

164. See Reiter, *supra* note 1, at 224. Courts should review claims brought by PRPs with heightened scrutiny. See *id.* at 216-18.

165. See *id.* at 224-26. If, during pretrial motions, under a heavy burden of clear and convincing evidence, plaintiffs could demonstrate that the proposed plans did in fact conflict with the goals of CERCLA, the challenge should be heard on the merits. See *id.* at 225-26.

166. See *id.* at 225. It must be clear to the court that the challenge claims to modify an ineffective or inferior remedy and provide a potentially better and more effective choice of remedy, not simply a different one. See *id.*

167. *Broward*, 157 F. Supp. 2d 1329, 1337-43 (S.D. Fla. 2001).

168. See Murphy, *supra* note 162, at 619. Courts' selected lift of section 113(h)'s bar on pre-enforcement review could be considered judicial legislation, but such action is necessary to accomplish the goals of CERCLA until Congress amends § 113(h) to include a workable and enforceable health-based exception. See *id.*

169. *Broward*, 157 F. Supp. 2d at 1337-39; see also, *Clinton County*, 116 F.3d 1018, 1018 (3d Cir. 1997) (overruling decisions creating health-based exception).

dial actions to raise legitimate claims challenging specific EPA proposals. However, the decision did leave open the possibility of pre-enforcement review of constitutional challenges to CERCLA itself.¹⁷⁰ The court did not adopt the view held by a majority of circuits that section 113(h) strictly bars review of all pre-enforcement challenges.¹⁷¹ The decision can be viewed as a moderate step towards a more analytical application of the jurisdictional bar.¹⁷² The use of an analytical approach in determining the application of the bar will ultimately make courts more aware of the advantages of a selective bar over an absolute bar.¹⁷³ Their analysis will require a closer examination of the goals of the statute, and the effects of the proposed action. A more in depth analysis into section 113(h) will lead courts to recognize that an absolute bar compromises the general goals of CERCLA, and that the best way to protect the environment and human life is to create a limited, health-based exception to section 113(h)'s preclusion of pre-enforcement review.¹⁷⁴

Robert G. Ruggieri

170. See *Broward*, 157 F. Supp. 2d at 1341-43 (finding it unnecessary to definitively adapt complete bar or First Circuit's test).

171. See *id.* (noting Plaintiffs' constitutional claims would be barred under both majority and First Circuit's test).

172. See generally *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (en banc). For further discussion on the First Circuit's test in *Reardon*, see *supra* notes 92-99 and accompanying text.

173. See *Reiter*, *supra* note 1, at 223-27. (arguing selective bar better serves ultimate goals of CERCLA).

174. See *Healy*, *supra* note 4, at 325 (recognizing inherent unfairness of absolute pre-enforcement bar).